UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

RICHARD F. MASSARO,	:	
Plaintiff,	:	
	:	
-vs-	:	Civil No. 3:02cv537 (PCD)
	:	
ALLINGTOWN FIRE DISTRICT, *et al.*,	:	
Defendants.	:	

RULING ON PLAINTIFF'S MOTION FOR A PROTECTIVE ORDER AND MOTION FOR EXPEDITED BRIEFING OF MOTION TO AMEND COMPLAINT

Plaintiff moves for a protective order prohibiting use of a tape recording of a conversation involving plaintiff from his deposition and moves for an expedited briefing schedule on his motion to amend the complaint. For the reasons set forth herein, the motions are **denied**.

I. BACKGROUND

As alleged, on or about November 2, 2002, plaintiff's conversation in his private office with fire lieutenant Augusto DiMarzo was recorded without his knowledge or consent. During the conversation, plaintiff allegedly used racial slurs. Disciplinary proceedings were initiated against plaintiff for the alleged misconduct. A copy of the tape recording was provided to the New Haven Register and Channel 8. Plaintiff now seeks a protective order precluding use of the subject tape recording his deposition.

II. MOTION FOR PROTECTIVE ORDER

Plaintiff argues that defendants may not use the tape recording in his deposition as such use is precluded by 18 U.S.C. § 2515 and CONN. GEN. STAT. § 53a-187.

A. Standard

A protective order appropriately issues to prevent "injury, harassment or abuse of the court's processes." *Bridge C.A.T. Scan Assocs. v. Technicare Corp.*, 710 F.2d 940, 944-45 (2d Cir. 1983); FED. R. CIV. P. 26(c). "[T]he burden is upon the party seeking nondisclosure or a protective order to show good cause." *Penthouse Int'l v. Playboy Enters.*, 663 F.2d 371, 391 (2d Cir.1981); *In re Agent Orange*, 821 F.2d 139, 145 (2d Cir. 1987).

> Rule 26(c) places the burden of persuasion on the party seeking the protective order. To overcome the presumption, the party seeking the protective order must show good cause by demonstrating a particular need for protection. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the . . . test.

Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986).

B. Violation of 18 U.S.C. § 2515

The proposed use in a deposition of the tape recording does not constitute an adequate basis for a protective order. Section 2515 provides that "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence." The prohibition is on admissibility at trial, not on use of such evidence in discovery. *See Williams v. Poulos*, 11 F.3d 271, 286 (1st Cir. 1993) ("§ 2515 bans the introduction into evidence of both illegally intercepted material and any evidence derived therefrom."). As plaintiff has placed the evidence directly at issue through a claimed violation of 18 U.S.C. § 2520, defendants will not be precluded from preparing their defense, regardless of whether in plaintiff's opinion defendants have not vigorously pursued such a defense through discovery. *See Williams v. Poulos*, 801 F. Supp. 867, 875 (D. Me. 1992) ("[u]ntil the legality of the interceptions is finally adjudicated, defense counsel must be permitted to review and use the tapes and transcripts of the intercepted

conversations, to the extent necessary, to prepare their defense"); *McQuade v. Michael Gassner Mech. & Elec. Contractors, Inc.*, 587 F. Supp. 1183, 1190 (D. Conn.1984) ("[u]ntil both sides have had an opportunity through discovery to investigate the lawfulness *vel non* of the interceptions and recording, it is not appropriate to address questions regarding admissibility at trial of the tapes or prohibition of their disclosure").[1] As plaintiff has elected to allege a violation based on the recording, an order will not issue impeding defendants' ability to defend against the claim.

C. CONN. GEN. STAT. § 53a-187

The only conceivable civil action for violation of state wiretapping prohibitions arises under CONN. GEN. STAT. § 54-41r, which provides that "[a]ny person whose . . . communication is intercepted, disclosed or used shall . . . have a civil cause of action." As the state statute is "modeled after and closely resembles" the federal statute discussed above, *State v. DeMartin*, 171 Conn. 524, 543, 370 A.2d 1038 (1976), there is no basis for arriving at a different conclusion under state law. *See In re State Police Litig.*, 888 F. Supp. 1235, 1269 (D. Conn. 1995) ("the State Wiretap Act requires proof of the same essential elements as [the federal act], and . . . should be interpreted similarly"). Plaintiff therefore has not established that a protective order should issue under the circumstances.

III. MOTION FOR EXPEDITED BRIEFING

Plaintiff moves for expedited briefing of his motion for leave to amend his complaint. As the discovery period has ended, and in light of plaintiff's two prior requests for expedited briefing in which

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[1] It is further noted that plaintiff alleges that the contents of the tape have been disclosed to the media. Having so alleged, it is not apparent how presenting plaintiff with the contents of a recording with which he is presumably already familiar would constitute "injury, harassment or abuse of the court's processes." *Bridge C.A.T. Scan Assocs.*, 710 F.2d at 945.

expedited briefing was set only to have the dates extended at plaintiff's request, the motion is denied.

IV. CONCLUSION

Plaintiff's motion for a protective order (Doc. No. 33) is **denied** and plaintiff's motion for expedited briefing (Doc. No. 37) is **denied**.

SO ORDERED.

Dated at New Haven, Connecticut, May ___, 2003.

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Peter C. Dorsey
United States District Judge